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No. 93-1892

In the Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM FIORE, D/B/A MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY, PETITIONER

v.

CAROL M. BROWNER, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in imposing a civil penalty of $2,000 for each day of petitioner's noncompliance with an administrative order issued by the Environmental Protection Agency, requiring petitioner to determine whether hazardous wastes from his landfill had contaminated the nearby soil, surface water, or groundwater.

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OPINIONS BELOW

The unreported memorandum opinion of the court of appeals, which is not reproduced in the appendix to the petition for certiorari, is attached as an appendix to this brief (App., *infra*, 1a-4a). The judgment of affirmance of the court of appeals (Pet. App. A28-A29) is noted at 16 F.3d 404 (Table). The opinions of the district court (Pet. App. A51-A54) and the United States Magistrate Judge (Pet. App. A30-A50) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1993. The petition for a writ of certiorari was filed on March 4, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this case, the United States Environmental Protection Agency (EPA) ordered petitioner to determine whether hazardous wastes from his landfill, adjacent to the Youghiogheny River, had contaminated the nearby soil, surface water, or groundwater. Pet. App. A35. The district court imposed a civil penalty of $2,000 for each day of petitioner's 240 days of non-compliance with that administrative order. Pet. App. A54. The court of appeals affirmed. App., *infra*, 1a-4a; Pet. App. A28-A29.

1. The Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.* (RCRA), is a comprehensive environmental statute under which the Administrator of the EPA is granted broad authority to regulate solid and hazardous wastes. Subtitle C of RCRA, 42 U.S.C. 6921-6939, establishes "a 'cradle-to-grave' regulatory structure overseeing the safe treatment, storage and disposal of hazardous waste," *United Technologies Corp.* v. *EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987), including requirements governing the conduct of generators and transporters of hazardous waste, and of owners and operators of treatment, storage, and disposal facilities.

Section 2002(a) of RCRA confers on the Administrator broad powers to regulate the storage, treatment, transportation, and disposal of potentially hazardous wastes. 42 U.S.C. 6912(a). Section 3004 empowers the Administrator to "promulgate regulations establishing such performance standards, applicable to owners and

operators of facilities for the treatment, storage, or disposal of hazardous waste identified or listed under [Subtitle C], as may be necessary to protect human health and the environment." 42 U.S.C. 6924(a). Regulations promulgated by the Administrator include, among other things, the requirement that owners and operators of hazardous waste facilities must monitor levels of potential contaminants that may leach into the groundwater and must report certain groundwater data to the Administrator. See 40 C.F.R. 265.90-265.94 (interim status standards).

Section 3006 of RCRA, 42 U.S.C. 6926, also empowers the Administrator to approve state hazardous waste programs, to be administered and enforced in lieu of the federal program by States that have satisfied certain qualifying criteria. See 42 U.S.C. 6926(b). Such state programs are enforceable by both state and federal officers. See Section 3008(a) and (g); 42 U.S.C. 6928(a) and (g). On May 26, 1981, the Administrator granted interim approval, pursuant to Section 3006, to Pennsylvania's hazardous waste program at issue in this case, and on January 15, 1986, that program received final federal approval. 50 Fed. Reg. 46,734 (1985); 51 Fed. Reg. 1791 (1986). Like the parallel provisions of the federal program, Pennsylvania's hazardous waste regulations required owners and operators of hazardous waste facilities to monitor and report on groundwater conditions. See 25 Pa. Code § 75.265(n) (1986).

If the Administrator determines that any person has violated Subtitle C or its implementing regulations, she may issue an order, under Section 3008 of RCRA, assessing civil penalties for such violations and requiring compliance with any such provision. 42 U.S.C. 6928(a)(1). A violator that fails to comply with the order may be further liable for civil penalties of up to $25,000

per day. 42 U.S.C. 6928(c). Alternatively, whenever the Administrator determines that a person has violated any provision of Subtitle C or its implementing regulations, she may file suit in district court, seeking injunctive relief, penalties of up to $25,000 per day per violation, or both. Section 3008(a)(1) and (g), 42 U.S.C. 6928(a)(1) and (g).

Whenever the presence of hazardous wastes at a facility or their release from the facility may present a substantial hazard to human health or the environment, Section 3013(a) of RCRA, 42 U.S.C. 6934(a), empowers the Administrator to require the owner or operator of that hazardous waste facility to conduct whatever testing, monitoring, or other analysis is reasonably necessary to determine the nature and extent of the release. Section 3013(c) requires the recipient of such order to submit within thirty days a proposal for carrying out the monitoring, testing, and analysis mandated by EPA. The Administrator may also require the owner/operator to undertake the monitoring, testing, and analysis as proposed, or in accordance with modifications authorized by EPA. 42 U.S.C. 6934(c). If the recipient of a Section 3013 order fails or refuses to comply with the order, Section 3013(e) of RCRA, 42 U.S.C. 6934(e), authorizes the Administrator to commence a civil enforcement action in district court. The district courts have jurisdiction to require compliance with the Administrator's orders under Section 3013, and to assess a civil penalty of up to $5,000 per day for failure or refusal to comply with such orders. 42 U.S.C. 6934(e).

2. a. Petitioner William Fiore, doing business as Municipal and Industrial Disposal Company (MIDC), owned and operated a solid waste disposal facility located at Buena Vista, Pennsylvania. The facility is bounded on the south and east by the Youghiogheny River, and is

located in an area that has been heavily strip-mined. A trailer park is located near petitioner's landfill, and the water intake for the city of McKeesport, which uses the river as a source of its drinking water, is located eight miles downriver. C.A. Supp. App. 53, 59.

On December 16, 1982, MIDC submitted a RCRA permit application to EPA. The application identified certain hazardous wastes as being treated, stored, or disposed of at the facility. The primary hazardous waste disposed of at the facility was decanter tank car sludge. C.A. Supp. App. 1-6.

After a series of proceedings initiated against petitioner by the Pennsylvania Department of Environmental Resources revealed unpermitted discharges into a tributary of the Youghiogheny River, EPA filed an administrative complaint against petitioner, pursuant to Section 3008(a) of RCRA, alleging that MIDC had failed to develop an adequate groundwater sampling and analysis plan and had failed to implement groundwater monitoring, as required by 25 Pa. Code § 75.265(n)(7)-(9) (1986), which was then part of Pennsylvania's federally approved hazardous waste program. C.A. Supp. App. 30-31. An Administrative Law Judge (ALJ) found that MIDC had violated 25 Pa. Code § 75.265(n)(8) and (9) (1986), by failing to perform even one quarter of the groundwater monitoring which was required. C.A. Supp. App. 35-36. For this, the ALJ imposed a nonrecurring penalty of $25,250 against MIDC, and ordered MIDC to undertake groundwater monitoring. *Id.* at 29, 37. The Chief Judicial Officer of EPA affirmed the ALJ's decision on appeal on November 1, 1988. *Id.* at 42-51.

EPA also issued an order, on March 11, 1987, to MIDC under Section 3013(a) of RCRA, requiring MIDC to submit a written proposal of the sampling, analysis, monitoring, and reporting of data relating to hazardous

wastes at its site. C.A. Supp. App. 60. The Section 3013 order was based on information that the presence of hazardous waste, or the release of such waste from MIDC's facility, might present a substantial hazard to human health and the environment. *Id.* at 52-66. Petitioner never submitted a comprehensive proposal to study the hazardous waste landfill.

On May 29, 1987 (approximately one and one-half months after MIDC's response to the Section 3013 order was due), James Webb of the RCRA Enforcement Section, Hazardous Waste Management Division of Region III of EPA, had a telephone conversation with a consultant to petitioner. The consultant told Webb that he was sending Webb a report or proposal. The report subsequently received by Webb did not provide any information about the surface water, soil, or groundwater sampling. C.A. App. 2, 13-15, 213.

On June 30, 1987, Webb informed petitioner's consultant that the proposal did not meet the requirements of the Section 3013 order. C.A. App. 213. In response to an August 7, 1987, letter from petitioner's consultant, EPA again informed MIDC that the proposal submitted by MIDC's engineers did not meet the requirements of the Section 3013 order. C.A. App. 18.

In September, 1987, EPA sent to petitioner's consultant a partial copy of a report by an EPA contractor, showing where samples had been taken at the facility. EPA also mailed a letter and part of the contractor's report on the MIDC landfill to petitioner. C.A. App. 21-22. In response, counsel for petitioner informed EPA by letter that petitioner was not prepared to submit a proposed plan until he had had the opportunity to review the entire investigative report compiled by EPA's contractor. By telephone, Webb informed petitioner's counsel that, since the contractor's

RCRA ,Facility Assessment report was based on information obtained from petitioner, petitioner did not need to review the entire report to prepare the proposed work plan required by the Section 3013 order. *Id.* at 22-23. Finally, by letter dated December 14, 1987, EPA informed counsel for petitioner that EPA would no longer look to petitioner to submit and implement the proposal ordered pursuant to the March 11, 1987, Section 3013 order. *Id.* at 214.

b. On December 1, 1988, the date that the penalty for the violation of Section 3008 of RCRA became due (see p. 5, *supra*), MIDC brought the present action against EPA by filing a complaint in district court. The complaint alleged that EPA's November 1, 1988, decision imposing penalties on MIDC was arbitrary and capricious and contrary to law, and sought to have the penalties vacated. C.A. Supp. App. 67-70.

EPA answered the complaint and filed a three-count counterclaim. C.A. Supp. App. 71-83. In the first claim, EPA sought a civil penalty of $25,000 for each day that MIDC had failed to pay the $25,250 in penalties imposed by the ALJ on the administrative complaint. *Id.* at 78-79. This claim was based on Section 3008(c) and (g) of RCRA. In the second claim, EPA sought payment of the administrative penalties imposed under Section 3008, plus interest. C.A. Supp. App. 79-80. In the third claim, brought under Section 3013(e), EPA sought a civil penalty of $5,000 for each day of MIDC's noncompliance with the Section 3013 order. C.A. Supp. App. 80. The district court granted the United States' motion for summary judgment on all three counterclaims. *Id.* at 102-103.

c. Petitioner asserted that he was unable to pay any penalty. The magistrate held a hearing on the penalty issue on July 9, 1992. See C.A. App. 1-178. At the

hearing, the government reviewed the history of the proceedings relating to petitioner's facility and introduced evidence showing that, by not complying with the Section 3013 order, petitioner had reaped an economic benefit of $212,000. C.A. App. 85. An EPA investigator also testified that petitioner had the ability to pay at least $800,000. *Id.* 86-87, 216. Petitioner did not testify at the hearing, and, except for introducing evidence relating to liens on his properties, petitioner failed to present any evidence to rebut the government's testimony. *Id.* at 216.

The magistrate credited the evidence introduced by the government and, in proposed findings of fact and conclusions of law, recommended that the district court impose a penalty of $2,000 per day of noncompliance, which, the magistrate specifically noted, "would be sufficiently punitive without being excessive." Pet. App. A48-A49. Petitioner objected to that recommendation, contending "that a penalty of no more than $1,000.00 per day would be appropriate under the circumstances, which amount would serve as a deterrent and would sufficiently punish [petitioner] without being overly punitive." C.A. App. 230-231. The district court entered an order adopting as its opinion the proposed findings of fact, conclusions of law, and recommendation for disposition of the magistrate judge. Pet. App. A51-A54.

d. The court of appeals affirmed in an unpublished decision (App., *infra*, 1a-4a). After reviewing the five factors identified in *United States* v. *Reader's Digest Association*, 662 F.2d 955, 967 (3d Cir. 1981), cert. denied, 455 U.S. 908 (1982), to be considered by the district courts in assessing civil penalties,* the court noted

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* These factors are "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability

(App., *infra*, 3a) that petitioner relied on the third factor, contending that the district court had erred by not adequately considering his ability to pay the penalty. The court found this contention to be without merit. *Ibid.* The court of appeals noted that the EPA investigator had testified that, by not complying with the agency's order, petitioner had reaped an economic benefit of $212,000, and that petitioner had the ability to pay at least $800,000. *Ibid.* The court also noted that petitioner had presented no evidence whatsoever of his assets or ability to pay, and, instead, his counsel had argued only that "[m]ost cases . . . have imposed a penalty in the range of about $1,000 a day." *Ibid.*

In disagreeing with petitioner's contention that the penalty recommended by the magistrate would be overly punitive, the court noted that the magistrate had found that petitioner had "discharged into the ground water serious hazardous waste constituents which, among other things, * * * can cause leukemia, anemia, retarded nervous system development in young children, behavioral problems, stillbirth, [and] miscarriages." App., *infra*, at 3a. The court also noted that the magistrate had found no evidence that petitioner made any good faith effort to cooperate. *Id.* at 4a. Finally, the court concluded that "the bad faith of the [petitioner] and the serious nature of the injury to the public are well-established by the evidence of record and the findings of the magistrate judge are well-supported." *Ibid.*

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to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the [agency]." 662 F.2d at 967.

ARGUMENT

1. In his petition's question presented and conclusion, but not in the body of the petition, petitioner raises for the first time the contention that the penalty imposed on him by the district court violated the Fifth and Eighth Amendments. These constitutional questions were neither presented to the lower courts nor passed upon by them, and, accordingly, they have been waived. As a general rule, this Court will not review issues not raised or considered in the lower courts. See, *e.g.*, *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Petitioner presents no reason for disregarding this rule in his case.

2. In any event, petitioner's assertions (Pet. 10) that the district court erred by allegedly ignoring the evidence of his inability to pay, and that this resulted in the trial court's imposing an "overly punitive" sanction, are without merit. As the court of appeals recognized in this case and in its previous decision in *Reader's Digest*, petitioner had the burden of establishing his inability to pay a civil penalty, and petitioner does not challenge the validity of the *Reader's Digest* test or contend that the Third Circuit's decision on that point conflicts with decisions of this Court or any other court of appeals. The government introduced evidence of the financial benefit that petitioner reaped, and uncontradicted evidence that he has unencumbered bank accounts and real property worth approximately $1.8 million (App. *infra*, 3a). Yet, as the court noted, petitioner presented no evidence whatsoever of his assets or ability to pay, relying instead on his counsel's argument that most cases have imposed a lesser penalty.

As for petitioner's contention that the penalty imposed by the district court was overly punitive, the Third Circuit correctly noted the extremely serious health hazards presented by the toxic constituents leaching from petitioner's landfill and petitioner's lack of good faith or cooperation with EPA. The court also noted (App., *infra*, 4a) that "the record [was] replete with evidence that [petitioner's] efforts were largely limited to frustrating the efforts of the EPA and that all the while his violations were creating an economic benefit to him which totalled in excess of $200,000." In addition, as the court of appeals observed, Section 3013(e) of RCRA authorizes the district courts to impose a penalty of up to $5,000 for each day of noncompliance, whereas, in this case, the district court imposed a penalty of only $2,000 per day. 42 U.S.C. 6934(e); App., *infra*, 4a. The court of appeals thus correctly held that the district court did not abuse its discretion by imposing a penalty of $2,000 for each day of noncompliance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1994

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 92-3636

MUNICIPAL & INDUSTRIAL DISPOSAL COMPANY

v.

CAROL M. BROWNER,* IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY, WILLIAM FIORE, D/B/A MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY,* APPELLANTS

* (Pursuant to Rule 12(a), F.R.A.P.)

* (Pursuant to Rule 43(c), F.R.A.P.)

On APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 88-02631)
District Judge: Hon. Alan N. Bloch

Submitted Under Third Circuit LAR 34.1(a)
on December 9, 1993

Before: BECKER and NYGAARD, Circuit Judges,
and YOHN, District Judge.*

[Filed Dec. 20, 1993]

MEMORANDUM OPINION

NYGAARD, Circuit Judge

Municipal & Industrial Disposal Company and William Fiore appeal a district court order which imposed a $2,000 per day penalty against them under section 3013 of the Resource Conservation and Recovery Act for 240 days of violations, resulting in a total penalty of $480,000. Appellants contend that the district court erred by failing to consider their ability to pay. We will affirm.

In *United States v. Readers Digest Association, Inc.*, 622 F.2d 955 (3d Cir. 1981), *cert. denied* 455 U.S. (1982), we identified five factors to be considered by the district court in assessing civil penalties:

(1) The good or bad faith of the defendant;

(2) The injury to the public;

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* Honorable William H. Yohn, Jr., United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

(3) The defendant's ability to pay;

(4) The desire to eliminate the benefits derived by a violation; and

(5) The necessity for vindicating the authority of the enforcing party.

On appeal, Fiore specifically argues the third of these factors and contends the district court erred by not adequately considering his ability to pay the penalty. We find the issue without merit.

Appellant bears the burden of establishing its financial ability to pay a civil penalty. At the penalty hearing, the government presented evidence from the EPA's civil investigator that by not complying with the agency's order, Fiore had reaped an economic benefit of $212,000. Moreover, the investigator for the EPA testified that Fiore had the ability to pay at least $800,000 and the uncontradicted evidence shows that Fiore has unencumbered bank accounts and real property worth approximately $1.8 million. Yet, on the face of this evidence against him, Mr. Fiore presented no evidence whatsoever of his assets or ability to pay. Instead, counsel for the appellants argue that "Most cases . . . have imposed a penalty in the range of about $1,000 a day."

Appellant next contends that the penalty recommended by the magistrate judge and adopted by the district court "would be overly punitive." We disagree. First, the magistrate judge found that the appellant had discharged into the ground water serious hazardous waste constituents which, among other things, are toxic to aquatic organisms, can cause leukemia, anemia, retarded nervous system development in young children, behavioral problems, stillbirth, miscarriages, and which can adversely

affect several organs of the body. Second, she found no evidence that he made any good faith effort to cooperate. Moreover, although Fiore entered into a consent order, he thereafter failed to comply with it. We conclude that the bad faith of the defendant and the serious nature of the injury to the public are well-established by the evidence of record and the findings of the magistrate judge are well-supported.

Finally, the record is replete with evidence that appellant's efforts were largely limited to frustrating the efforts of the EPA and that all the while his violations were creating an economic benefit to him which totalled in excess of $200,000. Hence, we find no error in the proposed findings and recommendation of the magistrate judge that a fine in this amount was necessary to eliminate the benefits appellant derived by his violation and to vindicate the authority of the EPA.

The maximum penalty which the administrative judge could have recommended, and the district court could have awarded pursuant to section 3103 of the Act is $5,000 per day. We see no error in the magistrate judge's recommendation that a $2,000 penalty would be appropriate. Accordingly, we see no error in the district court's decision to accept the recommendations of the magistrate judge, and we will affirm.